STATE OF MICHIGAN

COURT OF APPEALS

KEN HON SETO and SETO CHEMICAL COMPANY,

Plaintiffs-Appellees/Cross-Appellants,

v

ADCO PRODUCTS, INC.,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
September 23, 2003

No. 237208
Jackson Circuit Court
LC No. 99-096205-CK

Before: Meter, P.J., and Talbot and Borrello, J.J.

PER CURIAM.

Defendant appeals by leave granted the trial court's verdict following a bench trial. Plaintiffs cross-appeal the trial court's denial of pre-complaint interest and calculation of damages. We vacate the judgment and remand for further factual findings and application of the six-year statute of limitations. MCL 600.5807(8).

This case arose when plaintiffs entered into two contracts under which defendant would make caulk and adhesive sealant using plaintiffs' formulas and defendant would pay plaintiffs a percentage of the finished products' sales. Over several years, defendant unilaterally decreased plaintiffs' royalty percentage for caulk sales and otherwise underpaid plaintiffs sealant royalties.

Defendant first argues that the trial court's award of damages for the years 2000 and 2001 were improperly based on speculative evidence because defendant had not yet made sales in those years. We disagree. Defendant did not raise the issue regarding the evidence's speculative nature until after trial, so it forfeited it. MRE 103. This Court reviews the trial court's award of damages for clear error. *Triple E Produce Corp v Mastronardi Produce*, 209 Mich App 165, 176-177; 530 NW2d 772 (1995). This Court will not reverse a trial court's decision based on an unpreserved issue unless the court committed plain error that affected substantial rights. *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 606; 603 NW2d 824 (1999). While the law prohibits an award of future damages when their existence is speculative, it does not prohibit speculation regarding the amount of inevitable future damages. *Lopetrone v Roma Catering Co*, 20 Mich App 250, 254-255; 174 NW2d 53 (1969). In this case, defendant insisted that it justifiably paid caulk royalties at a lower rate even though plaintiffs never agreed to the rate's modification. Therefore, future damages were inevitable, and plaintiffs could collect them

in this suit because defendant repudiated its obligation to pay the contract amount. *Stanton v Dachille*, 186 Mich App 247, 252; 463 NW2d 479 (1990). Furthermore, the court's award of damages for 2000 and 2001 substantially comports with caulk sales in 1998 and 1999. Therefore, the court did not clearly err when it awarded plaintiffs damages for 2000 and 2001 based on their sales estimates for those years.

Defendant next argues that the trial court failed to properly apply the relevant statute of limitations, MCL 600.5807(8). We agree. Whether a trial court properly applies the statute of limitations is a question of law we review de novo. *Ashby v Byrnes*, 251 Mich App 537, 540; 651 NW2d 922 (2002). Plaintiffs began receiving royalties from defendant in 1986, but the contracts do not contain provisions regarding when defendant must make its royalty payments. Therefore, under the rules of contract interpretation, the court was required to determine, without regard to parole evidence, a reasonable time for performance. *Brady v Central Excavators, Inc*, 316 Mich 594, 607; 25 NW2d 630 (1947). In this case, the court failed to determine a reasonable time for payment of royalties, finding instead that the royalties were payable until the end of each contracts' term. Each contracts' term in this case lasted fifteen years, however, and defendant demonstrated its ability to calculate and issue payments on a regular, monthly basis. Monthly payments would provide steady income to plaintiffs and require defendant to stay diligent without overburdening its administration. Under this case's circumstances a monthly payment schedule, rather than a lump sum after fifteen years, is reasonable. Therefore, the contract presumably required defendant to pay plaintiffs their royalties at a monthly rate. *Johnson v Landa*, 10 Mich App 152, 156-157; 159 NW2d 165 (1968).

Like other cases involving contracts for percentages of sales, the contracts for royalties in this case are akin to an installment contract. *HJ Tucker and Associates, Inc v Allied Chucker and Engineering Co*, 234 Mich App 550, 562; 595 NW2d 176 (1999). Therefore, each installment's shortfall caused a new breach of contract to accrue and started MCL 600.5807's limitations period running. *Id*. at 262-263. Plaintiffs primarily base their claims on inadequate payments that came due more than six years before they filed suit in this case. To complicate matters, plaintiffs first filed a suit in Ohio, and the record does not disclose when that suit was initiated, when it was dismissed, or whether plaintiffs appropriately filed it so it would toll the statute's running. *Hoekstra v Bose*, 253 Mich App 460, 466; 655 NW2d 298 (2002). Therefore, we vacate the court's award in this regard and remand for a determination of what damages fall within MCL 600.5807's six-year period given that each breach claimed by plaintiffs accrued the month they received the incomplete payment.

Plaintiffs argue on cross-appeal that the trial court erred when it failed to award them pre-complaint interest. The grant of pre-complaint interest as part of an injured party's damages rests within the discretion of the factfinder. See *Holloway Construction Co v Oakland County Board of Rd Commr's*, 450 Mich 608, 617-618; 543 NW2d 923 (1996); *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531, 536-537; 369 NW2d 922 (1985). In this case, plaintiffs failed to raise the issue until after trial. Furthermore, their original expectation that defendant would eventually pay them in full and their delay in bringing this suit negate their argument that pre-complaint damages constitute necessary compensation for loss of their money's use.

Finally, plaintiffs assert error in the trial court's determination of the amount of defendant's sealant sales from 1986 to 1990. While the court did not reveal its sources and

calculations, the record indicates that the court probably based its sales determinations and corresponding royalty award on plaintiffs' estimates. By purposely or negligently contributing to a claimed error below, a party waives that error's appellate review. *Phinney v Perlmutter*, 222 Mich App 513, 537-538; 564 NW2d 532 (1997). Furthermore, plaintiffs' basis for error is unfounded on this record. Therefore, the trial court did not clearly err in defendant's favor when it determined defendant's sales from 1986 to 1990.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Stephen L. Borrello